No. 87-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN, FREEDOM OF INFORMATION CLEARINGHOUSE AND NATIONAL TREASURY EMPLOYEES UNION

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INTEREST OF THE *AMICI CURIAE*

Public Citizen and the Freedom of Information Clearinghouse are non-profit public interest organizations that promote public access to government information. Having brought hundreds of Freedom of Information Act ("FOIA") cases over the past 15 years, many of which concerned claims arising under the Act's privacy exemptions, Exemptions 6 and 7(C), these *amici* have an interest in ensuring the viability of the congressionally mandated balancing test that controls the public's access to records that implicate privacy interests. The National Treasury Employees Union, a federal sector labor union that is the exclusive bargaining representative for more than 120,000 federal employees, also has litigated numerous FOIA cases under Exemption 6, including several that have been stayed pending resolution of this case, and thus it likewise has

an interest in ensuring that the courts will continue to apply the balancing test consistent with congressional intent.

Although *amici* support the result reached in the court of appeals, their interest in this litigation does not stem from a desire to obtain the particular type of records at issue in this case, but, rather, relates to the test that will determine access to records that implicate privacy interests. *Amici* urge the Court to reject the court of appeals' analysis which runs afoul of the language of Exemptions 6 and 7(C) of the FOIA, as well as two-decades of judicial decisions applying those exemptions. Thus, like petitioners, *amici* ask this Court to clarify that Exemptions 6 and 7(C) require the courts to conduct *de novo* balancing of the privacy and public interests implicated in particular records and that such balancing must include an assessment of the public interest in disclosure of the particular records. In *amici*'s view, however, petitioners have advocated artificial limits on the factors that courts may take into account in applying the balancing test, which would inappropriately result in a denial of access in this case. Moreover, while we agree with the court of appeals and respondents that a remand is proper, our version of what should transpire on remand differs from theirs.[1]

STATEMENT OF THE CASE

Amici concur generally in petitioners' statement of the case, and will highlight below only the facts that go to the heart of the courts' obligation to conduct a balancing test under the privacy exemptions of the Freedom of Information Act ("FOIA").

[1]Counsel for petitioners and respondents have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 36.2 of the Rules of this Court.

This case concerns two FOIA requests made by representatives of the news media for records of the criminal histories of several members of the Medico family. The requesters made these FOIA requests in order to uncover any illegal dealings between the Medicos and Representative Daniel Flood, who had reportedly been involved in arranging defense contracts involving millions of dollars for a business operated by the Medicos. Joint Appendix ("J.A.") 97, 128-29. Moreover, the Medicos' business had been identified by the Pennsylvania Crime Commission as a business dominated by organized crime. J.A. 97-98, 128-29. As the court of appeals concluded in its initial opinion below, "the requesters' goal in this case, exposing 'the potential abuse of government funds,' is of public interest." 816 F.2d 730, 742 (D.C. Cir. 1987).

As part of its criminal history files, the Justice Department compiles "rap sheets" on individuals consisting of information about arrests, convictions or incarcerations at the federal, state or local level. These composite records are routinely distributed to law enforcement agencies and other authorized recipients for employment and licensing purposes. 28 C.F.R. § 20.33; J.A. 63-65. In addition, the Department will release rap sheets to the subject of the rap sheet. 28 C.F.R. §§16.32 & 20.34. It will also release rap sheets to the press to facilitate the apprehension of wanted persons, because it has determined that such releases are in the public interest. *Id.*§ 20.33(a)(4).

In the course of this litigation, the Department made two non-routine disclosures of rap sheet information. First, it released the rap sheets of three of the Medicos who are deceased because, according to the Department, "[a] decedent's privacy interest disappears at his death," J.A. 49, and thus there is "no longer any substantial privacy interest to be protected." Pet. Br. at 6; J.A. 108-17, 120-26. Second,

the Department confirmed that, with respect to Charles Medico, the sole living subject of the requesters' FOIA requests, it has no rap sheet records pertaining to "financial crimes." It made that disclosure because it agreed with the requesters that disclosure of such records "would be in the public interest." J.A. 108 & 110; *accord* J.A. 105, 113, 115, 117, 121.

Aside from these disclosures, the Department has officially refused to confirm or deny whether it has any records on Charles Medico. J.A. 81, 89. However, the court of appeals disclosed that the withheld records contain information about "minor" crimes that occurred more than thirty years ago. 816 F.2d at 738, 741. Indeed, throughout its brief, the Department characterizes this case as one concerning "obscure" criminal history information. Pet. Br. at 18, 20, 22, 24, 31. However, rather than expressly acknowledging that responsive records exist, and providing additional information to enable the requesters to participate in the debate over whether the records must be disclosed the Department has urged the courts to decide this case based on its *in camera* submission of the withheld records. *Id.* at 50.

The district court granted summary judgment to the Department, primarily on the ground that 28 U.S.C. § 534 is an Exemption 3 statute that precludes disclosure of rap sheets, a holding that the court of appeals reversed and petitioners have not raised before this Court. App. 54a-55a. In addition, the district court concluded that responsive records other than rap sheets, which it called "non-public agency records," were exempt from disclosure under the balancing test of Exemptions 6 and 7(C). App. 56a. The D.C. Circuit reversed in two sets of opinions that call into question the role of the courts in weighing competing interests under the privacy exemptions.

At the outset of its first opinion, the majority, in a decision written by Judge Laurence H. Silberman, entertained the notion that there are no privacy interests in records that have previously been made public. 816 F.2d at 738-39. However, upon review of this Court's opinions in *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), it concluded that a low-level privacy interest does remain in some matters that are on the public record. *Id.* at 739-40. The court then turned to the privacy exemptions' balancing test, which has traditionally been employed to determine whether an identifiable privacy interest is outweighed by the public interest in disclosure. After remarking on "the awkwardness of the federal judiciary appraising the public interest in the release of government records," *id.* at 740, and calling such determinations "idiosyncratic," *id.* at 741, the court refused to consider the public interest in the records, concluding that "[w]e *as judges* are unable to distinguish between the public interest in different criminal records based on the specific intent behind the request, or, for that matter, normally, the identity of the subject of the criminal record." *Id.* at 742 (emphasis in original)(footnote omitted). Instead, the court established a bright-line test based on whether state and local governments have made a determination to place information on the public record, and it remanded the case for a determination of whether the requested records are a matter of public record at their source. *Id.* at 740-41.

Judge Kenneth W. Starr filed an opinion concurring in the result but disagreeing with the majority's public interest analysis because it rested solely on whether other political entities have decided to make the information public. In Judge Starr's words, the majority's approach "collapse[d] improperly a Congressionally-mandated balancing process into a single-factor test; in the process of this curious metamorphosis, the

majority has, with all respect, ignored a number of factors that should figure into a proper assessment of the public interest." *Id.* at 743.

In response to the government's petition for rehearing, the majority modified its rationale, and Judge Starr turned his prior concurrence into a dissent. Although the majority now concluded that it would be inappropriate to defer entirely to state and local determinations to make arrest and conviction records a matter of public record, it revised the balancing test drastically from prior cases, based on what it perceived to be the judiciary's inability to carry out the statutory balancing. 831 F.2d 1124, 1125-26 (D.C. Cir. 1987). Thus, the majority concluded that courts are unable to measure the value of information with reference to the purposes of the FOIA, or "a particular requester's purpose in seeking information, or his proposed use," *id.* at 1125-26; as a result, it collapsed the public interest analysis into a static consideration of the "general disclosure policies of the statute." *Id.* at 1126. Under this approach, federal courts are to do no more than "consider whether there is a cognizable privacy interest in the information sought, and then appraise the impairment to that interest that would result from disclosure." *Id.* The court reversed and remanded the case to the district court for an application of this essentially one-sided test. *Id.* at 1127.

Dissenting, Judge Starr criticized the majority's attempt to write the case-by-case public interest determination out of the statute. In contrast to the majority, Judge Starr found that "there *is* meaning in the public-interest standard; the way in which meaning is imparted to that term will depend on the information that is sought and the circumstances in each case." *Id.* at 1129. Elaborating, Judge Starr indicated that courts should look to the subject matter of the request, the identity and purpose of the requester and any other factors that bear

on the public interest in disclosure. *Id.* at 1128-29; 816 F.2d at 745-46. Without any further discussion of how the balancing test applies to the instant request, Judge Starr then concluded that "the privacy interest here outweighs the limited public interest in Charles Medico," and the district court's judgment should be affirmed. 831 F.2d at 1130.

SUMMARY OF ARGUMENT

In FOIA Exemptions 6 and 7(C), Congress directed the courts to balance the privacy interests at stake against the public interest in disclosure. Nonetheless, the court of appeals refused to apply this balancing test and essentially rewrote the statute to eliminate such balancing, thereby disregarding the Act's mandate.

The court of appeals' majority refused to apply the balancing test because it concluded that it would be inappropriate for the judiciary to make what it characterized as "awkward" and "idiosyncratic" determinations of the public interest. Not only does this conclusion run afoul of the Act's statutory mandate, but it disregards the role of courts in evaluating the public interest in numerous other contexts, such as in determining whether to issue injunctions and in deciding whether to unseal grand jury records. Similarly, courts have evaluated the privacy interests at stake in construing the Fourth Amendment ban on unreasonable searches and seizures and in determining whether a libel plaintiff is a public figure. Moreover, in the FOIA context, courts have, pursuant to congressional direction, decided where the public interest lies under the privacy exemptions and other aspects of the FOIA, such as in awarding attorneys' fees and reviewing agencies' fee waiver determinations. Based on this vast experience in making privacy and public interest determinations, federal courts are well-equipped to balance competing interests pursuant to Congress'

directive in the privacy exemptions. Thus, we agree with the Department that courts cannot simply refuse to conduct the *de novo* balancing test required by Exemptions 6 and 7(C).

More specifically, the court of appeals erred in limiting its balancing to only a select few of the competing interests at stake. The privacy exemptions call for a balancing of *all* the relevant factors under the circumstances, not simply one factor, however important it may be. Thus, in contrast to the position adopted by the court of appeals' majority and advocated by the requesters below, the public availability of records is but one of many significant factors on the privacy side of the balance. On the other side, the public interest in the records cannot be limited to a general interest in disclosure, as suggested by the court of appeals, or to the so-called "core purposes" of the FOIA, as proposed by the Department. Rather, it must encompass a broad enough inquiry to allow consideration of the nature and purpose of the request and the many ways that the public could benefit from disclosure of specific records.

Under the appropriate balancing test, the government has not met its burden of proving that disclosure of the requested records would constitute an unwarranted (or clearly unwarranted) invasion of personal privacy. Therefore, the case should be remanded to the district court to engage in a proper balancing, based on further public submissions by the Department, which are required if it is to meet its burden of proof under the law.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REFUSING TO HEED CONGRESS' DIRECTION THAT COURTS BALANCE PRIVACY INTERESTS AGAINST THE PUBLIC INTEREST IN DISCLOSURE.

The court of appeals refused to apply the balancing test that is required by Exemptions 6 and 7(C) based on two erroneous assumptions: (1) that Congress could not have meant for courts to apply such a test, and (2) that, even if Congress did mean to place this responsibility on the judiciary, the courts are unable to engage in such balancing. Both of these assumptions are entirely unfounded.

It has never before been disputed that Exemptions 6 and 7(C) require the courts to balance the privacy interests at stake against the public interest in disclosure. By their own terms, the privacy exemptions do not forbid all invasions of privacy but only those that are "unwarranted" or, in the case of Exemption 6, "clearly unwarranted." As the House Report makes clear, "[t]he limitation of 'a clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), *in* Subcomm. on Administrative Practice & Procedure, Senate Comm. on the Judiciary, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 32 (1974)("1974 Source Book"). Both the House and Senate Reports explicitly call for a judicial balancing of the competing interests:

> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny,and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), 1974 Source Book at 44; S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964), 1974 Source Book at 92.

Congress rejected a rigid privacy exemption because it would not take into account the many factors that need to be considered in determining whether privacy interests outweigh interests in disclosure of particular records. H.R. Rep. No. 1497, at 11, 1974 Source Book at 32. Instead of striking the balance itself, "Congress enunciated a single policy, to be enforced . . . by the courts, 'that will involve a balancing' of the private and public interests." *Department of the Air Force v. Rose*, 425 U.S. 352, 373 (1976). Thus, it "delegate[d] to the courts the task of making the ultimate determination with respect to disclosure on the basis of the criteria that Congress set." 831 F.2d at 1130 (Starr, J., dissenting). In doing so, Congress "concluded that the balancing of private against public interests . . . should limit the scope of the exemption: 'It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.' ' " *Department of State v. Washington Post Co.*,

456 U.S. 595, 599 (1982), *quoting* S. Rep. No. 813, at 9. Placement of the burden of proof on the government, along with the requirement that all exemptions be narrowly construed, also provide a check on the privacy exemptions, as does the requirement that the courts conduct the privacy balancing test *de novo*, which ensures "that the ultimate decision as to the propriety of the agency's action is made by the court and prevent[s] it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, at 8, Source Book at 43.

Despite Congress' mandate that courts balance the competing interests *de novo*, Judge Silberman effectively wrote the balancing test out of the statute by pleading judicial incapacity to assess the specific privacy and public interests at stake. Although he conceded that Congress directed courts to engage in such balancing, he concluded in his first opinion that "surely Congress could not have intended federal judges to make such idiosyncratic determinations. Indeed, had Congress done so, the task thus entrusted to the federal judiciary might arguably exceed Article III limitations." 816 F.2d at 741 (citations omitted). In his second opinion, he reiterated that, if Congress meant for courts to make their "own appraisal of the public's need to know particular information[,] . . . such an unbounded delegation would raise serious constitutional problems." 831 F.2d 1125, 1126 (citations omitted). Judge Silberman did not further elaborate on the constitutional concerns that seemingly led him to ignore the balancing test mandated by Congress.

It strains credulity to contend that it is beyond judicial capacity to determine whether privacy interests outweigh the public interest in the disclosure of certain government information. Indeed, courts have been making similar determinations, without apparent difficulty, for years.

Thus, courts often assess the weight of privacy interests in particular information. For example, in defamation and libel cases, courts determine whether particular plaintiffs have diminished expectations of privacy because they hold or seek government positions with responsibilities of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it," *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), or because they are public figures who "have assumed roles of especial prominence in the affairs of society [or] . . . have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Similarly, in deciding whether a search and seizure violates the Fourth Amendment, courts determine whether it offends an individual's expectation of privacy that "society accepts as objectively reasonable," which depends on a judicial assessment of such factors as the extent to which the individual knowingly exposes the object of the search to the public. *California v. Greenwood*, ____U.S.____, 108 S. Ct. 1625, 1628-29 (1988)(expectation of privacy in trash exposed to public view is unreasonable); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986)(expectation of privacy in backyard unreasonable because observable from airplanes); *see also Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)(in evaluating President Nixon's invasion of privacy challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note, Court weighed intrusion against public interest in subjecting records to archival screening).

Courts also decide whether the public interest counsels in favor of a particular outcome in numerous contexts. For example, in determining whether to issue an injunction, the courts balance competing interests, including whether such relief is necessary to prevent irreparable harm and whether the public

interest will be served by issuance of an injunction. *Yakus v. United States*, 321 U.S. 414, 440-41 (1944). Similarly, this Court has held that the public right of access to judicial records can be outweighed by privacy and other concerns. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978). Indeed, the Court remarked that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599. Likewise, in the area of protective orders, this Court has ruled that "the trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). And in deciding whether to unseal grand jury records, courts must "weigh carefully the competing interests in light of the relevant circumstances" in maintaining the secrecy of particular grand jury records and in disclosure of such records. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979). In such cases, less of a showing of a need for disclosure is required where the need for continued grand jury secrecy has diminished due, for example, to the passage of time. *Id.* at 223.

Other provisions of the FOIA also assign courts the express responsibility of making public interest determinations similar to those called for under the privacy exemptions. Thus, in deciding whether to award attorneys' fees to plaintiffs who prevail in FOIA actions, courts are required to determine whether the disclosure of the requested records benefitted the public and whether the requester's interest in the records is news or public-interest oriented rather than personal or commercial. 5 U.S.C. § 552(a)(4)(D); S. Rep. No. 93-854, 93d Cong., 2d Sess. 19-20 (1974), *in* Sub Comm. on Government Operations, Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, and Other Documents 171-72 (1975) ("1975 Source Book"). Similarly,

courts review fee waiver determinations *de novo* in order to ensure that agencies waive all processing costs where "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government . . . ." 5 U.S.C. § 552(a)(4)(A)(iii). Likewise, in evaluating exemption claims under Exemption 2, which allows the government to withhold information "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), courts decide whether "the public could not reasonably be expected to have an interest" in the matter, because the exemption does not apply to "matters subject to . . . a genuine and significant public interest." *Department of the Air Force v. Rose*, 425 U.S. at 369-70; *see also Washington Post Co. v. U.S. Department of Health & Human Services*, 690 F.2d 252, 269 (D.C. Cir. 1982)(impairment of ability to obtain information prong of Exemption 4 requires "balancing of the extent of impairment and the importance of the information against the public interest in disclosure"). As these examples show, Congress has routinely assigned the courts the function of making assessments of both public and privacy interests, and the courts have performed such functions without difficulty.

The court of appeals did not explain how courts can make other privacy and public interest determinations, but somehow can be institutionally incapable or constitutionally barred from applying the balancing test set forth in the FOIA's privacy exemptions. By throwing up its hands and refusing to engage in what it found to be an "awkward" and "idiosyncratic" balancing test, the court of appeals' majority, in the words of Judge Starr, simply "went AWOL, as it were, by failing entirely to heed Congress' directive." 816 F.2d at 744.

II. THE BALANCING TEST REQUIRES CONSIDERATION OF ALL THE CIRCUMSTANCES OF THE CASE.

Even when the court of appeals purported to apply a balancing test in its opinion on rehearing, it so limited the factors to be taken into account that it essentially wrote the test out of the statute. The majority's approach, which Judge Starr characterized as "a single-factor test," 816 F.2d at 743, runs counter to Congress' intent and two decades of FOIA precedent.

As noted above, Congress rejected a static privacy exemption in favor of judicial balancing of the interests in particular types of records. In discussing this balancing test, Congress distinguished between government information that has a "bearing or effect on the general public," H.R. Rep. No. 1497, at 8, 1974 Source Book at 29, and personal information which "might harm the individual," if disclosed. H.R. Rep. No. 1497 at 11; 1974 Source Book at 32. Thus, "[t]he public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." H.R. Rep. No. 1497, at 8, 1974 Source Book at 29. Similarly, "it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public." S. Rep. No 813, at 7; 1974 Source Book at 42. As these examples show, Congress envisioned some inquiry into the public interest in the subject matter of the request, as well as into the extent to which disclosure will harm the individual.

In shunning case-by-case balancing, the court of appeals' majority artificially reduced the inquiry to one privacy factor

and refused to consider the public interest side of the balance. Although the Department of Justice purports to endorse a balancing test that is "governed by a sensible evaluation of all relevant circumstances rather than a mechanical application of bright-line rules either favoring or barring disclosure," Pet. Br. at 30, it also proposes an overly restrictive inquiry into the public interest part of the equation, and overlooks the fact that it bears the burden of proving that privacy interests outweigh the public interests in disclosure. In contrast to both the court of appeals' and the Department's approaches, the only reasonable way for the courts to apply the balancing test is to consider *all* the relevant circumstances in any particular case.

On the privacy side, *amici* agree with the Department that courts should not reduce the inquiry to a single factor, such as whether the information is a matter of public record. However, the Department goes too far in downplaying the importance of prior disclosure of information on privacy interests. This factor is certainly significant, though not necessarily dispositive, in determining the extent to which disclosure will harm an individual. As this Court has stated, "the interests in privacy fade when the information involved already appears on the public record." *Cox Broadcasting v. Cohn*, *supra*, 420 U.S. at 494-95; *accord Nixon v. Administrator of General Services*, 433 U.S. at 459 ("of course, [President Nixon] cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public"). Thus, contrary to the Department's brief, courts cannot simply ignore the degree to which information has been made public in the past. And, contrary to the majority's approach in its initial opinion, courts cannot determine whether a matter has been publicized to such an extent that privacy interests are seriously eroded solely by looking to laws or official policies that require publication; actual publicity,

regardless of the existence of laws or formal policies, also must be considered.[2]

Numerous other factors also affect the extent to which disclosure will invade a person's privacy. For example, privacy interests vary depending on both the type of offense and the passage of time. And privacy interests in conviction records would be far less than such interests in arrests or mere accusations since convictions, by their very nature, are the result of public proceedings with certain standards of proof and due process and are both a matter of public record and more likely to be known in the community. *See Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 865 (D.C. Cir. 1981). Moreover, public figures, especially those holding or seeking government office, have a diminished privacy interest in their criminal histories by virtue of their public positions. *See Common Cause v. National Archives & Records Service*, 628 F.2d 179, 184 (D.C. Cir. 1980). In addition, the Department has taken the position in this case that privacy interests in records of deceased individuals are so greatly diminished that disclosure is warranted without any inquiry into the public interest in the records. J.A. 49; Pet. Br. at 6. The extent of a privacy interest may also be a function of whether the records at issue contain erroneous information that is extremely derogatory. Therefore, as this discussion shows, a court cannot make a meaningful determination of the privacy interests in requested records without engaging in a full analysis of the nature of the records.

The same is true with respect to the public interest side of the equation. Although the Department agrees that courts

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[2]In assessing the privacy interest in rap sheets or other records that are compilations of original records, the privacy interests are no greater or lesser in a compilation than they are in the original records. *See FBI v. Abramson*, 456 U.S. 615, 625, 628 (1982).

must consider the public interest in disclosure under the privacy exemptions, it takes an unreasonably narrow view first, of what constitutes the public interest and; second, of the factors that may be considered by the courts in assessing this interest. Moreover, the Department ignores the fact that it bears the burden or proving that the exemption applies.

In assessing whether the public interest would be served through disclosure of specific documents, the Department limits its inquiry to whether the so-called "core purposes of FOIA may be furthered by a given disclosure." Pet. Br. at 16, 45. However, as lower courts have often recognized, disclosure of information under the FOIA will often advance weighty objectives that may not fall within what the Department characterizes as the FOIA's core purposes. Thus, courts have gleaned policies from other statutes that counsel in favor of disclosure. For example, courts have often ordered the disclosure of employees' names and addresses to union bargaining representatives, not because it assists in understanding government activities -- the Department's characterization of the FOIA's "core purpose" — but because disclosure enhances effective union representation, one of the policies promoted by Congress in the federal labor relations laws. *See, e.g., United States Department of the Navy v. Federal Labor Relations Authority*, 840 F.2d 1131, 1136 (3d Cir. 1988); *United States Department of Agriculture v. Federal Labor Relations Authority*, 836 F.2d 1139, 1143 (8th Cir. 1988); *American Federation of Government Employees, Local 1760 v. Federal Labor Relations Authority*, 786 F.2d 554, 557 (2d Cir. 1986).

Similarly, there is a clear public interest in disclosure of government records concerning the harmful effects of third parties' activities on the environment, even where they do not specifically inform the public about government activities. Likewise, the vindication of constitutional rights that do not

implicate the FOIA's principal objectives can outweigh privacy interests. For example, in *Ferri v. Bell*, 645 F.2d 1213 (3d Cir. 1981), the requester sought disclosure of a third party's rap sheet in order to prove that criminal charges were dropped against the subject of the rap sheet in return for her testimony against him. The Third Circuit found a public interest in disclosure because the information might entitle Ferri to a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to inform a defendant of information that creates a reasonable doubt as to his guilt. 645 F.2d at 1218.

Therefore, there is simply no reason to limit the public interest inquiry to what the Department regards as the "core purposes" of the FOIA. Just as the courts should engage in a full inquiry into the privacy interests that are implicated in particular records, so too should they fully explore the entire range of public benefits that may flow from disclosure.

Obviously, the subject matter of the request is critical to a determination of whether disclosure will be in the public interest. As Judge Starr pointed out:

> Where what is at stake is the disclosure of personal information about a particular subject, one helpful vantage point is the public interest in the subject of the information request. Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant interest — one that overcomes the privacy interests at stake — in the rap sheet of a public figure or an official holding high government office.

831 F.2d at 1129 (citations omitted). Or, as Judge Starr stated in his original concurrence, "[i]n the circumstances of this case,

for example, it seems powerfully relevant that the offenses reflected on the requested records are minor and occurred a long time ago. A traffic ticket, let us say, scarcely partakes of the nature of an arrest, hypothetically, for murder." 816 F.2d at 745. Similarly, courts should consider the identity and purpose of the requester, which Judge Starr concluded would counsel in favor of disclosure in this case, since "the records are sought by representatives of the media for the avowed purpose of exposing the possible misuse of government funds — rather than by some idiosyncratic individual seeking to satisfy a mere curiosity about criminal records . . .." 816 F.2d at 745.

The court of appeals' majority, in a portion of its decision that is endorsed by the Department, Pet. Br. at 47-48 n.35, concluded that courts cannot inquire into the identity or purpose of the requester because the FOIA requires agencies to make records available "to any person," 5 U.S.C. § 552 (a)(3). However, the "any person" proviso merely eradicates the previous law which allowed access only to individuals who could demonstrate a special interest in the records. S. Rep. No. 813, at 5-6, 1974 Source Book at 40-41; 816 F.2d at 745-46 (Starr, J., concurring). Moreover, in its opinions, the court of appeals' majority relied on *Durns v. Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986), *cert. granted & op. vacated*, 56 U.S.L.W. 3817 (May 31, 1988), for the propositions that "information disclosed to anyone must be disclosed to everyone," 831 F.2d at 1126, and that "Congress granted the scholar and the scoundrel equal rights of access to agency records." 816 F.2d 742, *quoting Durns*, 804 F.2d at 706. However, in *United States Department of Justice v. Julian*, ____ U.S. ____, 108 S. Ct. 1606 (1988), this Court rejected both the result and rationale in *Durns*.

In *Durns*, the D.C. Circuit, in a 2-1 decision written by Judge Silberman, held that prisoners could not obtain access to their

presentence reports because the reports would be privileged when sought by third parties in discovery. The court based this holding on the principle that courts cannot distinguish among requesters under the FOIA. *Durns*, 804 F.2d at 706. Before this Court in *Julian*, the government made the same argument that Exemption 5 could not be construed "in such a way as to make an agency's duty to disclose a presentence report turn on the nature or identity of the requester." 108 S. Ct. at 1614. The Court specifically rejected the contention that "a privilege against disclosure must nonetheless be extended to all requests for these reports, or to none at all." *Id.* Elaborating, the Court made clear:

> The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class. In this case, it seems clear that there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report. As we noted above, there simply is *no* privilege preventing disclosure in the latter situation.

Id.(emphasis in original).

Congress endorsed a similar approach in the privacy exemptions by mandating a balancing of competing interests to determine whether information is exempt from disclosure. As articulated in the conference report accompanying the 1974 FOIA amendments, "disclosure of information about a person *to that person* does not constitute an invasion of his privacy," and thus the privacy exemptions cannot be used to deprive individuals of personal information about themselves. H. Conf.

Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); 1975 Source Book at 230 (emphasis added). Indeed, even the Department of Justice recognizes the common sense proposition that the identity of the requester has a sizable bearing on the outcome of the privacy balancing test since its own rules permit the disclosure of rap sheet information to the subject of the information. 28 C.F.R. § 16.32. It is likewise obvious that the identity of the requester can directly impinge on the public interest side of the equation.

After *Julian*, there can be no doubt that the identity and purpose of a requester may affect whether a particular document falls within an FOIA exemption. This approach makes eminent sense in the context of the privacy exemptions since the requester's identity and purpose are factors that can affect the extent to which there is a public interest in disclosure or a potential invasion of privacy.

III. PETITIONERS HAVE NOT MET THEIR BURDEN OF PROVING THAT DISCLOSURE IS LIKELY TO CAUSE AN UNWARRANTED INVASION OF PRIVACY.

In this case, the government did not meet its burden of proving that disclosure of the requested records is likely to cause an invasion of personal privacy. Indeed, instead of putting sufficient information on the record to meet its burden, the Department simply refused to confirm or deny the existence of responsive records. In the circumstances of this case, that approach is wholly unwarranted.

While there may be some situations in which the mere confirmation that responsive records exist will constitute an unwarranted invasion of personal privacy, the government bears the burden of proving that claim, as it does all other claims under the FOIA. *See, e.g., Phillippi v. CIA*, 546 F.2d 1009,

1012-13 (D.C. Cir. 1976). Moreover, the same privacy balancing test controls whether the government should be permitted to refuse to confirm the existence of responsive records. Thus, for example, privacy interests would be minimal if the subject of the record is a notorious criminal, such as Al Capone, or even William Medico, a subject of the original request in this case, whom the 1970 Pennsylvania Crime Commission had publicly confirmed had arrests and convictions on his record. J.A. 38, 97.[3]

In this case, the government has done no more than assert that disclosing even the existence of a rap sheet for an individual will inevitably constitute an invasion of privacy despite the fact that the only entries may be for offenses as minor as traffic infractions that occurred a long time ago. J.A. 81, 89; 816 F.2d at 745 (Starr, J., concurring). Indeed, one of the records released by the Department reflected that Phillip Medico was arrested on September 2, 1930, for violation of an unidentified city ordinance for which he was fined $100. J.A. 118-19, 122-23. The disclosure of such information would hardly lead to the adverse consequences postulated by the Department. Therefore, a mere confirmation that there is a rap sheet on Charles Medico, which might contain only such trivial information, would hardly constitute a substantial invasion of his privacy.

The Department's steadfast refusal to confirm the existence of such a record has led to an absurd situation in this case. The court of appeals' majority explicitly confirmed that there

[3]While it is generally true, as the Department asserts, that "[u]nless disclosure of [rap sheets] is *required* by FOIA, it is *prohibited* by the Privacy Act," Pet. Br. at 38, that is so because information must be disclosed under the FOIA unless the government meets its burden of demonstrating that it is exempt. Thus, the Privacy Act acts as a bar to disclosure only if the government has already met its burden, which may entail ascertaining the extent to which records have previously been made public.

are responsive records and that they concern minor offenses that occurred a long time ago, apparently concluding that such a revelation would not cause the harm that the privacy exemptions guard against. 816 F.2d at 738, 741, 744. Rather than litigate this case based on the court of appeals' disclosure, however, the Department continues to maintain that it cannot disclose whether any responsive records exist. Indeed, the Solicitor General has even gone so far as to "withdraw" his prior public representation that any responsive records "would be contained in an FBI 'rap sheet' . . . and would pertain to minor offenses that occurred more than thirty years ago." Letter to Honorable Joseph F. Spaniol, Clerk, Supreme Court of the United States, from Charles Fried, Solicitor General (January 14, 1988); Application for an Extension of Time (January 11, 1988).

As a result of the Department's insistence that it still cannot acknowledge that responsive records, in fact, exist, this litigation has proceeded without full adversarial testing of the government's claims. Thus, the Department has made an *in camera* submission without first placing on the public record information that could shed light on the proper application of the privacy balancing test, yet would not cause the harm that the exemptions protect against. Certainly, for instance, the government could provide the age of rap sheet entries, state whether they pertain to arrests or convictions, and provide a general description of the subject matter of any alleged offenses. Hence, there would be less public interest in minor traffic crimes than there would be in crimes disclosing any organized crime connections or relating to ex-Congressman Flood.

Finally, the lower court should not be permitted, as the Department urges, Pet. Br. at 50, to uphold the agency's exemption claim based on an *in camera* review of the withheld

records, without stating any reasons on the public record. By refusing to confirm that records exist or to place sufficient information on the public record to allow an independent assessment of whether the records are exempt, the government has thus far failed to meet its burden of proof under the FOIA and has turned *de novo* review into "meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, at 8, 1974 Source Book at 43.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed and the case remanded to the district court to apply the privacy exemption balancing test in light of all the relevant circumstances and based on the public record, unless the government makes a showing that placing such information on the public record will cause the harm that the exemptions are designed to guard against.

Respectfully submitted,

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